

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3
4 MITCHEL CALVERT,

5 Petitioner,

6 v.

CV-05-3028-FVS

7 ORDER DISMISSING REQUEST
8 FOR HABEAS CORPUS RELIEF

9 ALICE PAYNE,

10 Respondent.

11
12 **THIS MATTER** is before the Court pursuant to the Petitioner's
13 Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person
14 in State Custody, Ct. Rec. 6. Mr. Calvert is acting *pro se* in this
15 matter. Ms. Payne is represented by Attorney General Rob McKenna and
16 Assistant Attorney General John Joseph Samson. The Court has
17 reviewed the entire file, including the pleadings submitted by both
18 parties, and is now prepared to rule.

19 **BACKGROUND**

20 Mr. Calvert is a state prisoner who pleaded guilty to three
21 counts of child rape on March 18, 2002. After exhausting his state
22 remedies, he filed, *pro se*, a federal habeas corpus petition on March
23 11, 2005. The respondent contends his federal habeas corpus petition
24 is barred by the statute of limitations.

25 On May 28, 2002, the trial court sentenced Mr. Calvert to 120
26 months in prison. The trial court did not orally inform Mr. Calvert

1 that he had a right to appeal his exceptional sentence. Mr. Calvert
2 did, however, sign a plea statement that said defendants have a right
3 to appeal an exceptional sentence. (Ex. 2, p. 3) A defendant must
4 file notice of appeal within 30 days after the entry of the judgment,
5 otherwise the right to appeal is irrevocably waived. CrR 7.2(b) Mr.
6 Calvert did not file a notice of appeal.

7 Mr. Calvert's right to appeal expired on June 27, 2002, 30 days
8 after his sentence. On Jan. 15, 2003, about nine months after his
9 direct appeal period expired, Mr. Calvert sought collateral review
10 *pro se* in the state court system. He timely moved to modify his
11 sentence in Yakima County Superior Court. The Superior Court
12 transferred the motion to the Washington Court of Appeals, Division
13 Three. The Court of Appeals turned Mr. Calvert's motion into a
14 personal restraint petition. CrR 7.8. The Court of Appeals denied
15 the personal restraint petition. Mr. Calvert asked the Washington
16 Supreme Court for discretionary review of the Court of Appeals'
17 denial. The Washington Supreme Court denied discretionary review on
18 Dec. 4, 2003.

19 While Mr. Calvert pursued collateral review, a Washington
20 Supreme Court commissioner suggested that Mr. Calvert file a motion
21 in the Court of Appeals for an untimely direct appeal, given that the
22 trial court apparently did not orally inform Mr. Calvert of his right
23 to appeal his exceptional sentence. (Ex. 13, p. 4) On Dec. 11, 2003,
24 Mr. Calvert filed a motion for an untimely direct appeal, as
25 suggested by the commissioner. The Court of Appeals denied the
motion. Mr. Calvert appealed to the Washington Supreme Court, which

1 denied the motion on Nov. 30, 2004. The pursuit of his untimely
2 appeal took 354 days, from Dec. 11, 2003, to Nov. 30, 2004. (Near
3 the end of his untimely appeal, Mr. Calvert also pursued a second
4 personal restraint petition, which the Washington Supreme Court
5 denied.) On March 11, 2005, Mr. Calvert filed a federal petition for
6 writ of habeas corpus.

7 **RULING**

8 The petitioner claims the statute of limitations was tolled
9 while he pursued his untimely appeal. If the statute of limitations
10 was not tolled through the untimely appeal, Mr. Calvert exceeded the
11 statute of limitations. 28 U.S.C. § 2244(d)(1); § 2244(d)(2).
12 Including the 354 days Mr. Calvert pursued an untimely appeal, 674
13 days passed between the day Mr. Calvert's direct appeal period
14 expired, on June 27, 2002, and the day he filed his federal habeas
15 corpus petition, on March 11, 2005. If, on the other hand, the
16 statute of limitations was tolled through his untimely appeal, Mr.
17 Calvert would have used up only 320 days of his 365-day statute of
18 limitations period for filing.

19 State prisoners have one year to file federal habeas corpus
20 petitions, beginning from the time their direct appeal period expires
21 in state court. 28 U.S.C. § 2244(d)(1)(A). The statute of
22 limitations is tolled while a properly filed application for state
23 collateral relief is pending. 28 U.S.C. § 2244(d)(2).

24 The statute of limitations, for Mr. Calvert, began to run on
25 June 27, 2002, when his direct appeal period expired. Neither party
26 debates that the statute of limitations was tolled on Jan. 15, 2003,

1 when Mr. Calvert sought timely collateral review in the state courts.
2 The question is when the statute of limitations stopped being tolled.
3 Mr. Calvert contends the statute of limitations was tolled until Nov.
4 30, 2004, when his motion for an untimely appeal was finally denied.
5 The respondent contends the statute of limitations never was tolled
6 for the period between Dec. 11, 2003 and Nov. 30, 2004, while Mr.
7 Calvert pursued an untimely appeal.

8 Whether a motion for an untimely state appeal causes the federal
9 statute of limitations to be tolled is unclear. A U.S. Supreme Court
10 ruling and Second Circuit dicta suggest that such a motion does not
11 cause the statute of limitations to be tolled. Collateral state
12 appeals must be "properly filed" to cause the statute of limitations
13 to be tolled for federal habeas corpus petitions. § 2244(d)(2). In
14 general, a state post-conviction petition rejected by state courts as
15 untimely is not "properly filed." *Pace v. DiGuglielmo*, 125 S.Ct.
16 1807, 1810, 161 L.Ed.2d 669 (2005). According to dicta from the
17 Second Circuit, a "motion to extend the time for appeal" does not
18 appear to be a "properly filed" application for state collateral
19 review. *Bethea v. Girdich*, 293 F.3d 577, 579 (2nd Cir.2002). The
20 motion referred to by the Second Circuit is similar to Mr. Calvert's
21 motion for an untimely appeal. The policy against allowing a tolled
22 statute of limitations for such motions is that state prisoners could
23 abuse the statute of limitations otherwise. *Pace*, 125 S.Ct. at 1812
24 ("On petitioner's theory, a state prisoner could toll the statute of
25 limitations at will simply by filing untimely state post-conviction
26 petitions.")

1 Mr. Calvert says he only filed his motion for an untimely direct
2 appeal because a commissioner from the Washington Supreme Court
3 suggested he do so. In a Dec. 4, 2003 ruling on Mr. Calvert's
4 personal restraint petition, the commissioner wrote that Mr. Calvert
5 "may seek to file an untimely notice of appeal by separate motion in
6 the Court of Appeals, and if the State is unable to prove that he
7 knowingly and voluntarily waived his right to appeal, that court may
8 yet allow him to pursue an appeal." (Ex. 13, p. 4)

9 Mr. Calvert argues that he "should not be punished" for taking
10 the commissioner's "bad" advice about filing a motion for an untimely
11 direct appeal. (Petitioner's Traverse to Respondent's Answer and
12 Memorandum of Authorities, p.7). Mr. Calvert argues, without
13 specifically saying so, that he deserves equitable tolling through
14 the period that he pursued his motion for an untimely direct appeal.

15 To prove equitable tolling, a prisoner must show that 1) he
16 pursued his rights diligently and that 2) some extraordinary
17 circumstance stood in his way to prevent him from filing his federal
18 habeas corpus petition on time. *Pace*, 125 S.Ct. at 1814. Equitable
19 tolling is rare. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.1999).
20 A prisoner must show that an extraordinary circumstance stood in the
21 prisoner's way that made his federal petition "impossible" to file on
22 time. *Id.*, citing *Calderon v. United States District Court (Kelly)*,
23 163 F.3d 530, 541 (9th Cir.1998). See also *Alvarez-Machain v. United*
24 *States*, 107 F.3d 696, 701 (9th Cir.1996). The policy behind this
25 "high hurdle" is Congress' desire to accelerate the federal habeas
26 process. *Calderon v. United States District Court (Beeler)* 128 F.3d

1 1283, 1288-89 (9th Cir.1997). In one case, the Ninth Circuit denied
2 equitable tolling for a prisoner who missed the statute of
3 limitations deadline while he pursued two rounds of state collateral
4 review. *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir.2003). The
5 court said prisoners "must be careful to timely file in federal
6 court" after they conclude their first full rounds of state
7 collateral review, lest they "run afoul of the statute of
8 limitations." *Id.* To avoid that circumstance, the court said, a
9 petitioner could timely file a federal habeas corpus petition after
10 his first round of state collateral review is completed, then request
11 that the district court exercise its discretion to stay the petition
12 until the petitioner fully exhausted his second round of state
13 collateral review. *Id.*

14 Mr. Calvert pursued his rights diligently by filing all of his
15 appeals on time, with the exception of his initial direct appeal.
16 Arguably, his failure to file an initial direct appeal resulted from
17 the trial court's failure to inform him of his right to appeal his
18 exceptional sentence. However, the Court of Appeals and Washington
19 Supreme Court already considered this argument. They ruled that Mr.
20 Calvert did not show that the trial court's error entitled him to
21 relief. Specifically, a Washington Supreme Court commissioner ruled
22 that the Court of Appeals did not err in determining that Mr. Calvert
23 knowingly and voluntarily waived his right to appeal, partly because
24 Mr. Calvert signed a plea statement that mentioned his right to
25 appeal. His plea statement said:

26 I understand that the judge does not have to follow
anyone's recommendation as to sentence. The judge must impose a

1 sentence within the standard range of actual confinement and
 2 community custody unless the judge finds substantial and
 3 compelling reasons not to do so. *If the judge goes outside the*
standard range of actual confinement or community custody,
either the State or I can appeal that sentence. If the sentence
 4 is within the standard range, no one can appeal the sentence."

5 Statement of Defendant on Plea of Guilty, (Ex. 2, p. 3) (*italics*
 6 added).

7 Equitable tolling may be appropriate if a judge affirmatively
 8 misleads a petitioner, Justice O'Connor wrote in a concurring
 9 opinion. *Pliler v. Ford*, 542 U.S. 225, 124 S.Ct. 2441, 2448, 159
 10 L.Ed.2d 338 (2004) (O'Connor, S., concurring). Here, the Washington
 11 Supreme Court commissioner did not affirmatively mislead Mr. Calvert.
 12 The commissioner suggested that he pursue a motion for an untimely
 13 appeal. Mr. Calvert does not allege, and the record does not
 14 suggest, that the commissioner said, for example, that the statute of
 15 limitations would be tolled for any federal habeas petition that Mr.
 16 Calvert might file in the future. The burden was on Mr. Calvert to
 17 consider what needed to be done at the federal level while he pursued
 18 his untimely state appeal.

19 Mr. Calvert's situation as a *pro se* petitioner makes equitable
 20 tolling a close call in this case. As *Biggs* suggests, Mr. Calvert
 21 could have pursued a stay of his federal habeas corpus petition while
 22 pursuing his motion for an untimely appeal in state court. *Biggs*, 339
 23 F.3d at 1048. But this Court recognizes that *pro se* petitioners
 24 might have trouble finding out about stays. The statute of
 25 limitations says nothing explicitly about stays. Courts do not
 26 encourage judges to advise *pro se* petitioners about stays. *Pliler*,
 124 S.Ct. at 2446. (Such advice from a judge would undermine judges'
 roles as impartial decision makers, burden judges with the task of

1 figuring out when the statute of limitations runs out for each
2 petitioner, and risk misleading the *pro se* petitioners about the
3 requirements.) Moreover, the statute of limitations urges
4 petitioners to exhaust their remedies in state court. § 2254(b)(1)(A)
5 ("An application ... shall not be granted ... unless ... the
6 applicant has exhausted the remedies available in the courts of the
7 State ..."). That language might lead a *pro se* petitioner to believe
8 stays are not an option.

9 Ultimately, Mr. Calvert failed to show that it was "impossible"
10 to file his federal habeas corpus petition on time. *Miles*, 187 F.3d
11 at 1107. Regardless of the complexity involved in filing a federal
12 habeas corpus petition on time, the statute of limitations says
13 expressly that petitioners have a year to file their federal habeas
14 corpus petitions after their direct appeal period expires. §
15 2244(d)(1)(A). That should have alerted Mr. Calvert that he should
16 research the filing deadline further. It is true that *pro se* habeas
17 petitioners may not be held to the same technical standards as
18 litigants represented by counsel, *Corjasso v. Ayers*, 278 F.3d 874,
19 878 (9th Cir.2002) (tolling justified where a *pro se* petitioner's
20 petition was rejected by district court clerk merely because he used
21 the wrong cover sheet). But *pro se* petitioners are expected to
22 understand the statute of limitations. *Biggs*, 339 F.3d at 1048.

23 Given the preceding considerations, the Court concludes that
24 tolling of the statute of limitations is unwarranted. Accordingly,
25 the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a
26 Person in State Custody is denied.

IT IS HEREBY ORDERED:

1. The petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody, Ct. Rec. 6, is **DENIED**.
 2. Any other pending motions in this matter are **DENIED AS MOOT**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, furnish copies to the petitioner and counsel for the respondent, and close the file.

DATED this 11th day of October, 2005.

s/ Fred Van Sickle
Fred Van Sickle
Chief United States District Judge